No. 84-277

Office - Supreme Court, U.S.
FILED
DEC 3 1984
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DESOUSA

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

MARVIN E. FRANKEL
(Counsel of Record)

STEVEN E. GREENBAUM
MARC D. STERN

KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Petitioners The Board of Trustees of the Village of Scarsdale and The Village of Scarsdale

60pp

QUESTIONS PRESENTED

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court held that the University of Missouri had violated the Free Speech Clause when, on the stated basis of the Establishment Clause, it denied use of university facilities ("a forum generally open for use by student groups") to students desiring use of those facilities for religious worship and religious discussion. *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984), held that the City of Pawtucket, Rhode Island, had not violated the Establishment Clause of the First Amendment when it included a crèche in a display on private land that also contained a Santa Claus house, a Christmas tree and other figures and decorations. The questions presented by this case are:

(1) Whether a municipal governing board, having refused to allow a crèche to be placed in a small public park, should be compelled under the rule of *Widmar* v. *Vincent* to allow placement of the crèche in the park for the approximately two weeks of the Christmas season.

(2) Whether *Lynch* v. *Donnelly* shows that the board would not violate the Establishment Clause if it authorized placement of the crèche in the park.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
1. The Facts	2
2. The Decision of the District Court	8
3. The Decision of the Court of Appeals	11
SUMMARY OF ARGUMENT	13
ARGUMENT	16
I. MUNICIPALITIES ARE NOT REQUIRED TO PROVIDE PUBLIC SITES AND SUPPORT FOR SECTARIAN OR PARTISAN SIGNS OR SYMBOLS THAT OFFEND OR ALIENATE SOME RESIDENTS	16
A. Plaintiffs Demand an Aura of Public Support for, or Joinder in, Their Religious Expression	17
B. Signs and Symbols, Affixed to the Shared Public Land, Convey the Quality of Public Joinder or Approval Sought by Plaintiffs, and Are thus Materially Different from Speakers or Leafleteers Who Deliver Their Own Messages and then Depart	19

PAGE

C Municipal Authorities May Provide "Public Forums" that Are "Generally Open" for "Speakers," "Discourse" and "Debate" without Being Required to Allow Placement therein of Partisan or Sectarian Signs or Symbols 27

D. Substantial Interests and Basic First Amendment Principles Sustain Scarsdale's Position 31

1. Avoiding compelled support..... 32

2. Avoiding favoritism or its appearance 35

3. Neutrality and the Establishment Clause 37

E. Scarsdale's Refusal to Display a Crèche is Sustained by Compelling Interests.... 39

II. *LYNCH* V. *DONNELLY*, ALLOWING MUNICIPAL OFFICIALS TO INCLUDE A CRECHE IN A DISPLAY, IS DISTINGUISHABLE AND DOES NOT SUPPORT A JUDICIAL ORDER COMPELLING SCARSDALE'S BOARD TO PERMIT A CRECHE IN BONIFACE CIRCLE 40

A. There are Material Distinctions between the Pawtucket and the Scarsdale Facts 41

B. Even if Scarsdale Would not Violate the Establishment Clause by Allowing a Crèche, It Is not Required to Do So.. 47

CONCLUSION..... 49

TABLE OF AUTHORITIES

Cases PAGE

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 34 n.22

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977) 33

ACLU v. *City of Birmingham*, 588 F. Supp. 1337 (E.D. Mich. 1984) 44

ACLU v. *Rabun County Chamber of Commerce*, 510 F. Supp. 886 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983) .....22 & n.11, 46, 47 n.30

Allen v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973) .. 46

Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) 25

Board of Education v. *Allen*, 392 U.S. 236 (1968) 39 n.24

Bob Jones University v. *United States*, 461 U.S. 574 (1983) 39 n.24

Brown v. *Board of Education*, 347 U.S. 483 (1954) 19 n.5

Buckley v. *Valeo*, 424 U.S. 1 (1976) 36, 39, 40

Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961)..... 46

Carey v. *Brown*, 447 U.S. 455 (1980)..... 36, 40

Citizens Concerned for Separation of Church & State v. *City & County of Denver*, 481 F. Supp. 522 (D. Colo. 1979), *vacated on other grounds*, 628 F.2d 1289 (10th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981) 21

Citizens, Etc. v. *City & County of Denver*, 508 F. Supp. 823 (D. Colo. 1981) 22 n.10, 44

	PAGE
Citizens, Etc. v. *City & County of Denver*, 526 F. Supp. 1310 (D. Colo. 1981), *aff'd*, No. 82-1022 (10th Cir. May 14, 1984)	22 n.10
Clark v. *Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984)	28, 29, 35
Cohen v. *California*, 403 U.S. 15 (1971)	24-25, 30
Committee for Public Education v. *Nyquist*, 413 U.S. 756 (1973)	45
Conrad v. *City & County of Denver*, 656 P.2d 662 (Colo. 1982)	22
Consolidated Edison Co. v. *Public Service Commission*, 447 U.S. 530 (1980)	33, 40
CSC v. *Letter Carriers*, 413 U.S. 548 (1973)	36, 40
Elrod v. *Burns*, 427 U.S. 347 (1976)	33, 36, 40
Eugene Sand & Gravel, Inc. v. *City of Eugene*, 558 P.2d 338 (Or. 1976), *cert. denied*, 434 U.S. 876 (1977)	22 n.12
Evans v. *Newton*, 382 U.S. 296 (1966)	46
Everson v. *Board of Education*, 330 U.S. 1 (1947)	39 n.24, 45
FCC v. *League of Women Voters*, 104 S. Ct. 3106 (1984)	18, 33, 37, 40
FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978)	30 n.21
Fowler v. *Rhode Island*, 345 U.S. 67 (1953)	31

	PAGE
Fox v. *City of Los Angeles*, 587 P.2d 663 (Cal. 1978)	23, 25
Gilfillan v. *City of Philadelphia*, 637 F.2d 924 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981)	22
Gillette v. *United States*, 401 U.S. 437 (1971)	38
Goldstein v. *Fire Department of Suffern*, 559 F. Supp. 1389 (S.D.N.Y. 1983)	23, 46
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	27 n.19
Greater Houston Chapter of ACLU v. *Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984)	23
Greer v. *Spock*, 424 U.S. 828 (1976)	36
Hague v. *CIO*, 307 U.S. 496 (1939)	27-28, 29
Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)	27 n.19
Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952)	30 n.21
Larkin v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982)	36, 45
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974)	33, 36
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	9, 11, 45 & n.29, 47
Linmark Associates, Inc. v. *Township of Willingboro*, 431 U.S. 85 (1977)	40
Lowe v. *City of Eugene*, 451 P.2d 117 (Or.), *vacated on rehearing*, 459 P.2d 222 (Or.), *aff'd on further rehearing*, 463 P.2d 360 (Or. 1969), *cert. denied*, 397 U.S. 1042 (1970)	22, 46

PAGE

Luetkemeyer v. *Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) 39 n.24

Lynch v. *Donnelly*, 104 S. Ct. 1355 (1984), *reversing*, 525 F. Supp. 1150 (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982) ..... i, 11, 12, 14, 15, 22 n.10, 36, 41-48

Members of the City Council v. *Taxpayers for Vincent*, 104 S. Ct. 2118 (1984)..... 26 n.17, 28, 29, 33, 35, 37, 42

Metromedia, Inc., v. *City of San Diego*, 453 U.S. 490 (1981)..... 25-26 n.17, 30 n.21, 47

Monell v. *Department of Social Services*, 436 U.S. 658 (1978)..... 5 n.2

Monroe v. *Pape*, 365 U.S. 167 (1961)..... 5 n.2

Niemotko v. *Maryland*, 340 U.S. 268 (1951) .. 27 n.19, 31

Norwood v. *Harrison*, 413 U.S. 455 (1973) ..... 38, 39 & n.24

O'Hair v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979). 28

Perry Education Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)..... 26 n.17

Plessy v. *Ferguson*, 163 U.S. 537 (1896) 19 n.5

Regan v. *Taxation With Representation*, 461 U.S. 540 (1983)..... 39 n.24

Regan v. *Time, Inc.*, 104 S. Ct. 3262 (1984) 37, 40

Roemer v. *Board of Public Works*, 426 U.S. 736 (1976) 36

PAGE

Rubin v. *Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1977) 5 n.2

Saia v. *New York*, 334 U.S. 558 (1948) 28

Schad v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) 30

Schneider v. *State*, 308 U.S. 147 (1939) 28

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 47

Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975)..... 30 n.21

Spence v. *Washington*, 418 U.S. 405 (1974)..... 23, 24, 34

Stone v. *Graham*, 449 U.S. 39 (1980)..... 10, 29, 36, 47 n.30

Tilton v. *Richardson*, 403 U.S. 672 (1971)..... 38-39

United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 36

United States v. *Grace*, 461 U.S. 171 (1983) 28

United States v. *O'Brien*, 391 U.S. 367 (1968)... 40 n.26

United States v. *Schwimmer*, 279 U.S. 644 (1929) 34

Walz v. *Tax Commission*, 397 U.S. 664 (1970) .. 38, 39 n.24, 45

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943) 23, 32

Widmar v. *Vincent*, 454 U.S. 263 (1981) ..... i, 9, 11, 12, 13, 15, 16, 18, 26, 27, 28 n.20, 29, 30, 41, 46, 47

PAGE

Winters v. *New York*, 333 U.S. 507 (1948)..... 30

Wooley v. *Maynard*, 430 U.S. 705 (1977)..... 33, 34, 35

Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976)..... 24, 30 n.21, 37

Other Authorities

Z. BARBU, SOCIETY, CULTURE AND PERSONALITY 96 (1971)..... 24 n.15

C. ELDER & R. COBB, THE POLITICAL USES OF SYMBOLS 57 (1983)..... 23 nn.13, 14

Gaffney, *Political Divisiveness along Religious Lines*, 24 ST. LOUIS U.L.J. 205 (1980)..... 45 n.29

N.Y. Times, Nov. 11, 1984, at A28 ..... 25 n.16

N.Y. Times, Nov. 12, 1984, at A1 ..... 25 n.16

C. O'CONNOR, A SORT OF UTOPIA—SCARSDALE 1891-1981 188 (1983)..... 20 n.7

RESTATEMENT (SECOND) OF TRUSTS § 183 (1959) 35 n.23

SAPIR, *Symbolism*, in 14 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 492 (1939)..... 24 n.15

2 A. SCOTT, THE LAW OF TRUSTS § 183 (1967). 35 n.23

3 A. SCOTT, THE LAW OF TRUSTS § 232 (1967). 35 n.23

L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 30, 45-46 n.29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984
No. 84-277

THE BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE and THE VILLAGE OF SCARSDALE,

Petitioners,

—v.—

KATHLEEN S. MCCREARY, DAVID DRABKIN, ANN F. CAWLEY, ANGELINA J. MESSENGER, EDWARD R. NAPOLITANO, CHARLES E. BUTLER, JOHN D. HAWKINS, NANCY G. STEGER, RICHARD CACCIATO, CAROL ANN PASCAL, MARY T. THOMPSON and GREGORY DESOUSA

and

THE SCARSDALE CRECHE COMMITTEE, PATRICIA CURRAN, CYNTHIA BARSUHN, GRACE FELLOWS, DORIS ADLER, MARY TULLY, JOAN MANN and MARIA PEDULLA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–25a) is reported at 739 F.2d 716. The opinion of the District Court (Pet. App. 26a–61a) is reported at 575 F. Supp. 1112.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1984. The petition for a writ of certiorari was filed on

August 17, 1984, and was granted on October 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America, applicable to the States under the Fourteenth Amendment, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . . .

STATEMENT OF THE CASE

1. The Facts

The facts of the case were presented in a detailed stipulation, accompanying exhibits, answers to interrogatories and deposition testimony. They may be summarized as follows:

Boniface Circle is a plot of land in the center of Scarsdale's business district. Its area is about .075 acres. Deeded to the Village as a park in 1931, its surface is mainly grass. It contains a war memorial erected in 1949, a flagpole, an evergreen tree, dense hedges, two benches, two lampposts and a walkway (J.A. 46).[1]

Over the years, almost no physical signs, symbols or other objects have been displayed in Boniface Circle. For several hours one afternoon in 1961, the Community Fund was permitted to launch its drive by placing a model rocketship there, but was directed to remove that symbol to another public place for the rest of the eight-day drive (J.A. 62). A Scarsdale High School group held a one-day bake sale and art show there in 1971 (J.A. 60). During several Christmas seasons, Christmas lights have been placed by the Chamber of Commerce on

1 "J.A." refers to the Joint Appendix, "Pet. App." to the Appendix to the Petition for a Writ of Certiorari, "J. Ex." to the Exhibit Volume to the Court of Appeals Appendix, and "Stip. Ex." to exhibits included in the stipulated materials in the District Court record.

utility poles throughout the Village, including the two Boniface Circle lampposts (J.A. 50–51). In 1982, the evergreen tree in Boniface Circle was similarly decorated (J.A. 53); in prior years the Board allowed private groups to decorate Christmas trees on other Village-owned property (J.A. 53–54).

Elsewhere on Scarsdale public lands, in addition to Christmas lights and ornaments, permission has been given to emplace such standard objects and symbols as those of the American Red Cross, the Community Fund rocketship (for eight days), tables and easels for one-day bake sales, carnivals or art sales, United Fund signs, Cancer Committee swords, Boy and Girl Scout model campsites, and some similarly familiar things (J.A. 58–64). With the exception of the crèche involved herein, none of these physical symbols appears from the record to have been a controversial matter.

In October 1957 the Scarsdale Board granted a request by the Scarsdale Creche Committee for permission to place a crèche, or Nativity scene, in Boniface Circle, to express "the real significance of Christmas time" (J.A. 70). Thereafter, similar requests were granted in each year from 1958 through 1980 to have the Nativity scene on the Circle for about two weeks (J.A. 33–34). With the trivial exception of electricity for a light bulb in some past years, the cost of the crèche and its display has been borne entirely by the Creche Committee (J.A. 36).

At various times public places and facilities have been made available in Scarsdale for people conducting religious services and demonstrations (as distinguished from symbols like the crèche resting on public land for periods of days or weeks). These have included Christmas carol sings, at which invocations and benedictions have been offered (J.A. 51–52, 54), Memorial Day prayers at Boniface Circle (J.A. 54), patriotic Independence Day speeches (J.A. 54), religious services by groups of various faiths in Village-owned buildings called Wayside Cottage (J.A. 54–56) and the Crossway Firehouse (J.A. 61), and interfaith vigils and demonstrations in various public parks and streets (J.A. 54–55, 64), as well as church picnics and block parties (J.A. 58). A room in the public

library has been used by religious and other groups for speeches, seminars and the display of various articles, some with religious significance (J.A. 56–58). It does not appear that any of these "live" ceremonies or meetings has drawn objection from anyone in the Village.

Almost from the beginning, however, the placement of the crèche at Boniface Circle each Christmas season has evoked protests—sporadic at first, but increasing over time, so that the crèche has been a "hotly contested" issue in Scarsdale in recent years (Pet. App. 30a; J.A. 38–42, 44–45). The controversy, recounted in detail by the District Court (Pet. App. 30a–38a), began with protests by Jewish organizations in 1960 and 1963 (J.A. 38). These objectants deplored "the injection of religious matters in public affairs" (J.A. 74–75) and asserted, *inter alia*, that "many members of the Jewish community believe that their feelings . . . have been disregarded. . . . [in] an area involving a great deal of emotion" (J.A. 85). The Board of Trustees, among its other responses to the problem, in 1961 created a Special Committee to study it, later enlisted a professor of human relations as a consultant, and, in the late 1970s, solicited the views of the Scarsdale Human Relations Advisory Council (J.A. 38, 40). The Advisory Council, in the years 1976–1982, recommended that the crèche be permitted, but urged toward the end of the period that the Creche Committee should preferably use nonpublic property as its site (J.A. 40). The Trustees similarly, in the years 1979 and 1980, granted the request but (in 1979) "strongly recommended . . . that the Creche Committee consider rotating the creche among various Village churches [which had offered their property for the purpose] in future years" (J.A. 40, 39) and (in 1980) "strongly urge[d] that next year the Committee erect the creche at a location other than Village-owned property" (J.A. 40).

The objections to the crèche over the years came from both Christian and nonChristian residents. As the parties stipulated (J.A. 44):

> Some residents of Scarsdale who are not of the Christian faith are offended by display of the creche on public property because they believe it to favor the Christian religion and to be offensive and hostile to their different beliefs or non-beliefs. Some residents, both Christian and non-Christian, object to the creche because they perceive the placement of this symbol on public property as giving government sanction to, or support and endorsement of, the religious beliefs thus symbolized. Some, both Christian and non-Christian, object because they perceive the creche on public property as mingling government and religion in objectionable fashion.

Other residents, as was also stipulated (J.A. 44–45), supported the crèche and were offended when in 1981 and 1982 the applications to place it in Boniface Circle were denied:

> Some residents of the Village are offended that the Village has denied permission for the erection of the creche at Boniface Circle. Some of those residents view the display of the creche at Boniface Circle as a long standing tradition signifying dedication to peace and goodwill among men and women everywhere. Others view the creche as a symbol of the religious aspects of Christmas. Some residents view the Village's denial of permission to erect the creche as a denial of their right to express or receive a Christmas message or as an official rejection of the message which the creche brings to them.

As the level of controversy rose, it led to a lawsuit in 1976 to enjoin the allowance of a crèche on Boniface Circle, ending in a dismissal on a jurisdictional ground that has since become invalid (J.A. 39).[2] Also in 1976, and for the succeeding four

---

2 *Rubin* v. *Village of Scarsdale*, 440 F. Supp. 607 (S.D.N.Y. 1977). The dismissal as against the Village was ordered on the basis of *Monroe* v. *Pape*, 365 U.S. 167 (1961), since overruled in *Monell* v. *Department of Social Servs.*, 436 U.S. 658 (1978).

years, the Creche Committee was required to display a sign beside the crèche, saying "This creche has been erected and maintained solely by the Scarsdale Creche Committee, a private organization." No dimensions were specified (J.A. 36–37). The sign used in compliance was visible only from short distances (Pet. App. 34a), a condition later deemed by the Court of Appeals to need correction (*id.* at 22a).

1976 was also the year when, as noted above, five churches offered their grounds on a rotating basis as sites for the crèche to avoid the conflict over use of the public site (J.A. 39). Explaining their position, the ten clergymen making the offer issued a statement that said in part (J. Ex. 157):

> In keeping with our respect for one another's beliefs and in keeping with our government's position to protect religious freedom without promoting or restricting particular religious views, we believe that it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.

Other Christian clergymen took an opposite stance, supporting the display of the crèche on public land and later decrying the decision not to permit it (Pet. App. 33a; J.A. 39).

While permission for placing the Nativity scene on Boniface Circle continued to be granted through 1980, the unanimity of the Trustees on this subject ended in 1973, when one member abstained. The same member abstained in the following year (another being noted as absent). In 1975, there was a repeat of the abstention, while another member voted "Nay." In 1976, there was a "Nay" vote again and two members noted as absent. The "Nays" increased to two in 1978, three in 1980 and a majority of four in 1981 and 1982 (J.A. 34–36).

As reflected in the votes of the Trustees, the crèche became a political issue. Candidates seeking election declared their positions on the subject (J.A. 65–66). Voters, including a

plaintiff-deponent herein, deemed this a material question in considering how to cast their ballots (J. Ex. 191–92; J.A. 293).

Following denial of permission to display the crèche on Boniface Circle in 1981, there was "a small uproar [in the community] . . . which was refueled the following year when the board again voted to prohibit the creche" (Pet. App. 34a). Mayor Jean Stone, whose deciding vote defeated the application, received a large volume of mail pro and con. Much of the mail posed the issue as one of Christian versus Jew (Pet. App. 34a–35a; J.A. 296–99). Writers in this category appeared to assume, incorrectly, that the Mayor was Jewish (Pet. App. 34a; J.A. 296); a portion of her mail was "blatantly antisemitic" (Pet. App. 35a; J.A. 296).

In November 1981, after permission had been refused, the Creche Committee accepted an offer from a restaurant across the street from Boniface Circle and erected the crèche there on December 17, 1981 (J.A. 41, 43). After the 1982 denial the same offer was made, and some church properties were also made available. These offers were refused (J.A. 42–43).

Explaining the reasons for refusing the church locations, the chairperson of the Creche Committee mentioned that some of the properties offered were not centrally located, some presented topographical problems, and some already had crèches. The "first" and "preeminent" reason for this refusal was, however, that this "would destroy the ecumenical aspect of the Creche Committee" (Pet. App. 37a; J.A. 275). This reflected, as the District Court found, "that a dominant reason why the Creche Committee has wanted the creche at Boniface Circle is because Boniface Circle is *public* land" (Pet. App. 38a; emphasis in original).

The denial of the Creche Committee's request for 1982 was voted (4–3) at a special meeting of the Trustees on December 1, 1982 (J.A. 155–59). Thereafter, on December 7, 1982, a new group of individuals, which came to be known as the Citizens Group, filed an application to place a small crèche on Boniface Circle between December 19 and 26, 1982, stating that this "private personal property . . . should not be con-

fused with the Creche owned by the Creche Committee'' (J.A. 171). Again by a 4–3 vote, this application was denied on December 14, 1982 (J.A. 37).

The minutes of the Scarsdale Board reflect at least two concerns animating those who voted against allowing the crèche on Boniface Circle: (1) the belief, as expressed by clergymen and others, that the Village land should not be used in this way when the symbol thus sited gave offense to substantial numbers of Scarsdale residents, both Christian and nonChristian (J.A. 136–37, 143-44, 146; Stip. Ex. 54); and (2) the essentially legal position that the display over a period of some two weeks would contravene the Establishment Clause (J.A. 145; Stip. Ex. 54).

On February 7, 1983, the Citizens Group, which had never displayed its crèche (Pet. App. 38a), brought the first of the two actions consolidated herein, seeking, along with other relief, an injunction to compel permission for placement of its crèche on Boniface Circle (J.A. 2, 3–10). Recalling the purposes of its application to the Village Board, the Group recited ''desires to join in the Village's celebration of 'Christmas' by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions'' (J.A. 8). The Creche Committee filed its complaint on April 28, 1983 (J.A. 2, 16–24).

2. The Decision of the District Court

Having seen that crèches are displayed in Scarsdale outside homes and churches (Pet. App. 38a), the District Court began its analysis by rejecting the argument of the Citizens Group that denial of permission for its Nativity scene on Boniface Circle violated the Free Exercise Clause (*id.* at 39a).[3] The Court found ''solidly implicated'' (*id.* at 39a–40a), however, the plaintiffs' claimed rights under the Free Speech Clause.

Turning to that, the District Court first found that Boniface Circle is ''a traditional public forum'' (*id.* at 42a), and that the

3 The argument, eschewed by the Creche Committee, was abandoned by the Citizens Group as well in the Court of Appeals.

denial of the crèche applications was ''content-based'' (*id.* at 46a). This brought into issue Scarsdale's contention that the denials were justified by a ''compelling state interest''—namely, that allowance of the crèche would offend against the Establishment Clause (*id.* at 47a).

Dealing with this argument, Judge Stewart noted at the outset the undisputed proposition that the Nativity scene is a religious symbol (*id.* at 48a). He proceeded then to consider *Widmar* v. *Vincent*, 454 U.S. 263 (1981), upon which plaintiffs placed main reliance. Tracking *Widmar*, he pursued the three-pronged analysis of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–13 (1971) (Pet. App. 50a). He observed in this connection (*id.*) this Court's caution that *Widmar* was to be understood as limited to the particulars of that case, the ''basis for [that] decision'' being a ''narrow'' one. 454 U.S. at 273, 277.

In that light, the District Court found the first prong of the *Lemon* analysis—the existence of a valid secular purpose—satisfied in plaintiffs' favor under *Widmar* (Pet. App. 51a). As to the concern for ''government entanglement,'' the Judge found the problem ''more complex,'' but concluded that there could not be a finding of Establishment Clause violation ''on this ground alone'' (*id.* at 51a–52a). The decisive factor amounting to such a violation, he held, was the finding that the two-week sojourn of the crèche on Boniface Circle had a ''primary effect'' that advances religion (*id.* at 53a).

On this key point, the District Court stressed that religious speakers on the Circle—a rally, a sermon, leafletting—would clearly ''run free and clear of the Establishment Clause'' (*id.* at 53a). Distinguishing the placement of an unattended symbol from the personal, oral speech in *Widmar*, however, he found that

> when a symbol is placed on public land the land performs an added and enhanced *function*. No longer is the land just a place from which a message can be proclaimed; when a symbol is left on public land the land actually becomes the message bearer. [*Id.* at 55a; emphasis in original.]

In determining the effect of a religious symbol "erected and left on public property" (*id.* at 56a), the District Court relied upon this Court's decisions emphasizing the danger of the "appearance" of state sponsorship of religious beliefs or joinder in religious activities (*id.* at 54a–55a). It found the danger realized in this case (*id.* at 56a–58a; emphasis in original):

> The record suggests that, in contrast to public gathering uses, people have objected to the creche precisely because an aura of Village approval has adhered to it. Removing this aura of Village approval was the primary concern of the members of Scarsdale's clergy who offered their church properties on an annually rotating basis for display of the creche.
>
> Indeed, cultivating an aura of Village approval is, in our view, one of the factors fueling plaintiffs' desire to have the creche on public property. . . . The Creche Committee has conceded . . . [its] desire to enhance the creche's merely religious message with an "ecumenical aspect.". . . Imbuing the creche with an ecumenical appearance . . . would seem to occur *only* if Village land—the property of "all the people"—is in fact linked in the receiver's mind with the message, since there is nothing inherently ecumenical about the creche standing alone. . . . In contrast to *Widmar*, not only does there appear to be an "imprimatur of State approval" when the creche sits at Boniface Circle; plaintiffs actually seek it.

The District Court went on to observe that "[t]he advancement problems are not cured by the placement of a sign next to the creche" (*id.* at 59a), referring, *inter alia*, to *Stone* v. *Graham*, 449 U.S. 39 (1980).

It concluded that the Village was justified in denying both crèche applications "in order to avoid contravening the Establishment Clause" (Pet. App. 60a).

3. The Decision of the Court of Appeals

After the decision of the District Court, while plaintiffs' appeals were pending, this Court decided *Lynch* v. *Donnelly*, 104 S. Ct. 1355 (1984). "Based upon the controlling precedents of *Lynch* and *Widmar*" (Pet. App. 2a), the Court of Appeals reversed and ordered a remand.

The Court of Appeals agreed with a number of the District Court's findings and conclusions: that the case involves a "public forum," that the Scarsdale Board's decisions were "content-based," that the Nativity scene is "a form of speech" and that the three-pronged analysis of *Lemon* v. *Kurtzman* was appropriate for this case. The appellate decision also joined in Judge Stewart's views on two of the three prongs, agreeing that the "secular purpose" factor is satisfied under *Widmar* and concluding, somewhat more strongly after *Lynch*, that the circumstances did not disclose the kind of "entanglement with religion" (including "potential political divisiveness") comprising an Establishment Clause violation.

The decisive point of disagreement was the Court of Appeals' conclusion that allowing the Nativity scene at Boniface Circle would not "have the direct and immediate effect of advancing religion" (Pet. App. 18a). Reviewing a series of this Court's decisions rejecting attacks on state action under the Establishment Clause (*id.* at 18a–19a), the Court of Appeals applied here the conclusion in *Lynch* that while there would be an advancement effect, it would be "indirect, remote or incidental" (*id.* at 19a). Referring to both *Lynch* and *Widmar* in this appraisal, the opinion says the result favoring the present plaintiffs follows *a fortiori* (*id.*):

> [T]he city involved in *Lynch* purchased, erected, displayed, sponsored and owned the creche therein. If the *Lynch* creche was not construed as a primary advancement of religion, *a fortiori*, the Village's neutral accommodation herein to permit the display of a creche in a

traditional public forum at virtually no expense to it cannot be viewed as a violation of the primary-effect prong of the *Lemon* test and, therefore, violative of the establishment clause.

As to the question of appearance of public endorsement, the Court of Appeals again found the District Court refuted by *Lynch* and *Widmar* (Pet. App. 19a–20a):

> [T]he *Lynch* Court indicated that any perception that Pawtucket had aligned itself with the Christian faith by including the creche in its display was not a primary advancement of religion because the benefits conferred in such a situation are indirect, remote or incidental. *Id.* Moreover, *Widmar* stated that "an open forum . . . does not confer any imprimatur of State approval on religious sects or practices." 454 U.S. at 274. Under these principles, the Village's actions in permitting access to Boniface Circle for display of a creche—the same actions that would be necessary in permitting access for any display—do "not lead it into such an intimate relationship with religious authority that it appears . . . to be sponsoring . . . that authority." *Roemer*, 426 U.S. at 747–48 (footnote omitted).

The Court of Appeals, while caused "to hesitate" over this (Pet. App. 20a), found the record inadequate to ground a distinction from *Widmar* on the exposure of children (rather than university students alone) to the Scarsdale crèche. It also disagreed with the District Court's deprecation of the disclaimer sign, holding, however, that the comparatively inconspicuous sign involved here should be dealt with on remand by "an order concerning the size, visibility and message of an appropriate disclaimer sign or signs" (*id.* at 22a). Further, the Court dismissed Scarsdale's argument that *Lynch* was distinguishable on the grounds, among others, that the Pawtucket crèche had been emplaced among a variety of nonreligious objects and symbols, and was rested on private rather than public land (*id.*).

The Court of Appeals did not treat two factors deemed central by the District Court: (1) the difference in this context between live speakers or demonstrators and a controversial symbol standing alone in a public place for a period of about two weeks; and (2) the plaintiffs' insistence upon the public site as a means of achieving the "ecumenical aspect" of the crèche.

SUMMARY OF ARGUMENT

I. The Court of Appeals treated signs and symbols left for days or weeks on public land as no different under *Widmar* v. *Vincent*, 454 U.S. 263 (1981), than live speakers or leafleteers. This remarkable stretching of the Free Speech Clause would compel municipalities to make places in parks and other "public forums" not only for religious symbols, but for things like swastikas and vulgar signs containing words or thoughts that speakers have a right to utter in such settings. The result would make cherished local places, thus far reserved for shared communal symbols, ugly scenes of partisan and sectarian assertion. The transformation is not required, but repelled, by sound constitutional principles.

The plaintiffs have sought, clearly and explicitly, to link the Village with their religious expression by standing a crèche on Boniface Circle. As the District Court found, they desire the appearance of endorsement, an "aura" of public support, by making the public site their "message bearer." The point is hammered home by their insistence that public placement alone supplies the "ecumenical" appearance they desire. In pursuing this public joinder in their religious expression, the plaintiffs rely on the universal awareness that symbols tend to become associated in viewers' minds and feelings with the place in which they are seen. Courts, scholars and lay observers have noted repeatedly how a religious symbol planted on public ground conveys an impression of public affirmation and support. Thus, the plaintiffs seek to foist upon their fellow

villagers support of their religious statement, a species of forced expression against which the First Amendment is a protection.

Plaintiffs' effort is not one Scarsdale is compelled to implement merely because it has supplied a "public forum" for living speakers and listeners. The valued conception that parks, held in trust for all the people, are public forums has never signified, and should not come to signify, that they are places where people have a right to place and leave signs or statues or symbols that their neighbors, speaking through elected officials, find disagreeable, repugnant, painful or offensive. Contentious views that speakers must be allowed to express in the public forum are not thereby required to be allowed in the form of signs or symbols left unattended for days or weeks. A largely black village need not tolerate a burning cross on its green. A Jewish population need not make space on which to leave a swastika. A typically religious community need not allow a billboard on public land to argue, for two weeks or so around Christmas, that "religion is the opium of the people."

Against plaintiffs' weak interest in adding a park to all the other places in Scarsdale where Nativity scenes are or may be freely displayed, the Trustees weighed, and found properly overriding, countervailing interests in (1) avoiding coerced expression, (2) avoiding favoritism, or the appearance of favoritism, toward one sectarian position and (3) steering clear of an Establishment Clause violation in "letter or spirit." When the competing claims are assessed, even assuming that Scarsdale may in its circumstances allow a crèche at Boniface Circle, there is no sound basis for concluding that it must. Even on the doubtful premise that Scarsdale would have to demonstrate a "compelling interest" to resist plaintiffs' demand, the concerns just summarized would satisfy that standard.

II. The decision in *Lynch* v. *Donnelly* is distinguishable in several material respects. In any event, the ruling that Pawtucket was allowed to emplace a crèche does not mean or imply that Scarsdale is compelled to.

The difference between the private land in *Lynch* and the public oval here is significant. It is also important that Pawtucket's crèche was part of a "display" of mostly nonreligious, noncontroversial objects (Santa Claus' house, reindeer, a clown, an elephant, etc.) while the Scarsdale crèche has always stood, and is proposed to stand, in sharp, isolated relief. A further distinction of consequence is found in the absence of divisiveness on this subject in Pawtucket's history as against the long course of frequently bitter, acrimonious strife in Scarsdale. If, as was noted, the absence of divisiveness was significant in *Lynch*, its presence is significant here. Finally, there was a secular purpose officially proclaimed and found for the display of a Nativity scene in Pawtucket. A comparable purpose is not asserted, but is denied, by Scarsdale's Trustees. Here, only plaintiffs' religious purpose, including the drafting of their neighbors to support their religious expression on the shared land, would be served by a judicial decree commanding that a crèche be permitted in Boniface Circle.

Returning, finally, to *Widmar* v. *Vincent*, it is meaningful that the Establishment Clause defense there was not weighty, persuading no Justice of this Court, while the question here is surely as close as it can be. As this Court has taught repeatedly in picking the delicate way between the Religion Clauses, the interest reflected in either Clause may be a weighty ground justifying an official decision even where that decision is not compelled. In this important sense, the return to *Widmar* serves to underscore the cogency of the grounds on which Scarsdale's Board acted. A strong Establishment Clause interest, at a minimum, is added to the other justifications for resisting plaintiffs' demand. The totality defeats the contention that a court order should require installation of a crèche in the Scarsdale park.

ARGUMENT

I. MUNICIPALITIES ARE NOT REQUIRED TO PROVIDE PUBLIC SITES AND SUPPORT FOR SECTARIAN OR PARTISAN SIGNS OR SYMBOLS THAT OFFEND OR ALIENATE SOME RESIDENTS

This Point involves primarily the Free Speech Clause, and incidentally the Establishment Clause. In dealing with the question treated here, the respondents and the Court of Appeals have considered the case on the crude premise that expression, whether oral or in the form of an inanimate symbol, is undifferentiated "speech," governed by constitutional rules that are uniform across the board. That is a basic error. It has resulted in a ruling that today compels the Village to allow a Nativity scene to stand in a park at the Village center, and tomorrow, on the same free speech principle, will compel a place for a swastika, a hammer and sickle, vulgar signs and comparable varieties of symbolic "speech."

This unprecedented and intolerable result follows from a mechanical misuse of critical words and concepts. A "public forum" for speakers and oral discourse is transformed into an unheard of species of village common where the residents must support, and appear to endorse, structures and symbols that convey ideas the majority (through their representatives) find unsuitable or repugnant, whether because they divide neighbors from each other, because they are hateful (as are swastikas, for example, to most people), because they are ugly, or because on other grounds they do not satisfy the shared communal sentiments that account for statues or symbols villages place on their greens or parks.

The First Amendment has never been imagined to command such things. On the contrary, whatever municipalities may do in their parks, the right of their people under the First Amendment to resist forced expression argues forcefully against this kind of compulsion. The extension of *Widmar v. Vincent*, 454 U.S. 263 (1981), to order Scarsdale over its objection to have a Nativity scene stand for two weeks in Boniface Circle is a profound error.

A. Plaintiffs Demand an Aura of Public Support for, or Joinder in, Their Religious Expression

The plaintiffs, as they declare, demand that one or both of their crèches[4] stand on Boniface Circle to serve their "desires to join in the Village's celebration of 'Christmas' by giving recognition to the birth of Jesus Christ, the occasion and namesake of the holiday, and to celebrate and express religious convictions" (J.A. 8). That the crèche will serve "to celebrate and express religious convictions" is a constant and vital theme (*see* J.A. 7, 70, 160, 171, 172, 251, 268, 291; J. Ex. 157, 163, 186, 187, 205; Stip. Ex. 62 at p. 44). The crèche does this by itself, without human participation or accompaniment. To judge by the only one who testified on the subject, plaintiffs have no special interest even in appearing at the site to look at, enjoy or "join in" the expression of religious convictions (Pet. App. 55a n.18). It is the crèche on the public circle that joins the Village in their religious expression.

The absence of any plaintiff from that scene—the stated indifference at best to being present with their crèche—poses sharply the question: whose speech is this? Perfectly free to proclaim their Christian message in person, plaintiffs are not there. Nobody doubts they could illustrate their own public speech with a crèche at their side if they chose to. What they choose, however, is to place the crèche itself—alone—on the public ground, making a *public* statement.

As the District Court found (*id.* at 56a-58a), it is this desired joinder of symbol and public site for which the plaintiffs are pressing. In this bonding, the land becomes, physically and spiritually, the "message bearer" (*id.* at 55a-56a). In a village that abounds with churches, and with Nativity scenes widely and unobjectionably present on nonpublic land (*id.* at 38a-39a), no purpose or effect other than the fact of this statement enthroned on the public demesne is sought or served by

---

4 It has never been clear why two groups, with two different crèches, found it necessary to sue. In a brief opposing certiorari (p. 5 n.2) the Citizens Group for the first time announced that it would withdraw its demand if the Creche Committee's Nativity scene is ordered to be placed on Boniface Circle.

plaintiffs' demand under the First Amendment. What they seek, in a word, is "the appearance of an endorsement of their beliefs and practices from the [Village]." *Widmar* v. *Vincent*, 454 U.S. at 288 n.7 (White, J., dissenting).

Candidly etching this thought, plaintiffs have told us that only the public land supplies the "ecumenical" quality they seek. In addition to a private site across the street from Boniface Circle, plaintiffs were offered and rejected nearby church properties on which to place a crèche. While asserted problems of topography and location were mentioned, their "first" and "preeminent" reason for refusing a church site was that this "would destroy the ecumenical aspect of the Creche Committee" (Pet. App. 37a; J.A. 275). This is powerfully revealing. Plaintiffs are aware, obviously, that an accompanying sign could describe their crèche as that of the Creche Committee, not that of the church on whose land it stood. But they do not find that arrangement agreeable (J.A. 276-77). The Court of Appeals has advised them that a large enough sign will obliterate any impression of identification between the Village and their crèche standing on the Village's central public circle (Pet. App. 22a). But plaintiffs know better, as everyone should; they concede that the passerby, who may or may not read and carefully construe a sign, inevitably would associate the crèche on the church land with the church (*id.* at 56; J.A. 276, 311). *See FCC* v. *League of Women Voters*, 104 S. Ct. 3106, 3137 n.10 (1984) (Stevens, J., dissenting). Similarly, the crèche on the public land—not least for the young and impressionable— will have an association with the public. [5]

---

5 A Scarsdale letter-writer opposed to having the crèche on Boniface Circle wrote (Pet. App. 51a n.16): "Although I'm only 13 I feel the creche, a deeply religious symbol does not promote 'good will.' I am Jewish: my menorah lights will burn in my home. I like to think Boniface Circle belongs to all Scarsdalians."

The Court of Appeals was caused to "hesitate" about children, but found reassurance in the absence of psychological evidence on this subject (Pet. App. 20a). While the point is not critical, it might be argued that judges may notice that a heavily traveled circle at the village center is frequented by children and that children may experience more intensely than adults the

That is the distorted meaning of "ecumenical" in this setting. This species of "ecumenism" does not embrace the nonChristians in Scarsdale. The only embrace is the enlistment of nonconsenting villagers in a public alliance with plaintiffs' statement through a religious symbol of plaintiffs' religious assertions and convictions.[6] Plaintiffs' sound understanding of this reflects what courts, nonlegal scholars and all of us know about the power of charged symbols and their association with places and institutions.

B. Signs and Symbols, Affixed to the Shared Public Land, Convey the Quality of Public Joinder or Approval Sought by Plaintiffs, and Are thus Materially Different from Speakers or Leafleteers Who Deliver Their Own Messages and then Depart

Though it receives no notice in the opinion of the Court of Appeals, the difference between live speakers and an emotionally significant, unattended symbol is a cardinal fact in this case. All of us are conditioned from our earliest days to know that the statue or symbol standing in the park—be it George Washington or the flag and the war memorial that are the only such things in Boniface Circle—are wrapped in the shared and approving sentiments of the community. The thoughts and feelings they express are reinforced by their location and literal support on the public platform. Symbols objectionable to many residents are not found there. The people do not give "house room" or implicit approbation to symbols that many

---

emotional impacts of dramatic symbols. On judicial knowledge of how humans, adults and children, respond to social experiences, *compare Plessy* v. *Ferguson*, 163 U.S. 537 (1896), *with Brown* v. *Board of Educ.*, 347 U.S. 483, 493–94 (1954).

6 See Judge Stewart's appraisal (Pet. App. 57a): "Imbuing the creche with an ecumenical appearance . . . would seem to occur *only* if Village land—the property of 'all the people'—is in fact linked in the receiver's mind with the message, since there is nothing inherently ecumenical about the creche standing alone."

of them find painful or repugnant even where many or more others may find them agreeable.[7]

The power of association, brigading a symbol with its location, is of special consequence in dealing with religious symbols that are cherished by many or most people but are objectionable to others. Reflecting this reality, the District Court was in turn reflecting evidence in the record of this case illustrative of what everyone knows. The Mayor of Scarsdale when this suit began—herself a Christian, possessor of a private crèche, who had voted formerly to allow the display in Boniface Circle but had come to deem that a mistake (Pet. App. 34a, 37a, 60a)—put the thought in unadorned terms. Contrasting the crèche on Boniface Circle with the recurrent (and noncontroversial) use of Village buildings for varieties of religious services, she said (Pet. App. 60a; J.A. 295):

> the placement of the Creche in the center of the village . . . is more permanent, it is a solid seeable religious artifact . . . and you see it there in the heart of Scarsdale on village property like the village is supporting it.

Others in the Village, Christian and nonChristian, expressed the same idea. A group of Christian clergymen, urging that the crèche should be on private rather than public land, declared that (Pet. App. 32a)

> it is inappropriate to use public property to make a religious statement. The freedom here involved is the right of each individual within the community to be assured that no certain religious symbol is presumed to represent him on the property which belongs to him in common with the fellow members of his community.

---

7 The District Court found that a substantial portion of Scarsdale's population is not Christian (Pet. App. 36a). While objections to the crèche came from Christians as well as others (*e.g.*, J.A. 44), it is not immaterial that by 1980 "Jews comprised the largest ethnic group in [Scarsdale], constituting roughly 50 percent of the total number of families." C. O'CONNOR, A SORT OF UTOPIA—SCARSDALE 1891-1981 188 (1983).

One opponent of allowing the crèche on Boniface Circle viewed its placement there as designed to "teach the rest of us that Scarsdale is still a Christian community" (J. Ex. 184). Other objectants spoke to similar effect.[8]

Perhaps even more strikingly, people insisting that the crèche should be on Boniface Circle made explicit its quality there of joining the Village in the religious expression. Illustrating from the record, the District Court mentioned *inter alia* a number of letters protesting the denial of permission to stand the crèche on Boniface Circle (Pet. App. 35a):

> One such letter/petition, subscribed to by about eighty or so signatories, stated, "Unless we are mistaken the United States is regarded by the world as a christian [sic] country, and the creche is simply a symbol of our christianity." Many letters deplored the ending of what they described as a "Village" or "Scarsdale Tradition." The letters at times refer to the creche as the "Scarsdale Creche."[9]

Like the residents of Scarsdale, the courts have noted that highly charged religious symbols deliver a message that may be powerfully buttressed by a public setting. A Denver court recorded "convincing and uncontroverted evidence . . . that the City's placement of [a] Nativity Scene on the front steps of the City and County Building (the very building to which the citizens must turn for government) is widely viewed as an affirmation and support of the tenets of the Christian faith." *Citizens Concerned for Separation of Church & State* v. *City & County of Denver*, 481 F. Supp. 522, 529 (D. Colo. 1979), *vacated on other grounds*, 628 F.2d 1289 (10th Cir. 1980), *cert. denied*, 452 U.S. 963 (1981).[10] See to the same effect, in

---

8 *See, e.g.*, J. Ex. 162 ("those who perceive [the crèche] in its public setting will recognize a public sanction and endorsement accorded the particular religious doctrine"); J. Ex. 163; Stip. Ex. 62 at pp. 8, 23, 28, 37, 40.

9 *See also* Stip. Ex. 63 at pp. 95, 100, 105-13, 150, 158; Stip. Ex. 65 at pp. 22, 26, 51 ("I am very puzzled by the Scarsdale Village Board's decision not to honor the birth of Christ on public property").

10 In a subsequent decision on the Denver situation, another district

the same setting, *Conrad* v. *City & County of Denver*, 656 P.2d 662, 675 (Colo. 1982). The "steps of the City and County buildings" may produce the appearance of an imprimatur more dramatically than the contested location in a central public circle, but the difference is one of degree, not of kind. Far from any public building, as a Georgia district court held, a "cross on state parkland impermissibly enmeshes state and church by creating the appearance of official backing for Christianity." *ACLU* v. *Rabun County Chamber of Commerce*, 510 F. Supp. 886, 892 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1379 (11th Cir. 1982), *modified and aff'd*, 698 F.2d 1098 (11th Cir. 1983).[11] Similarly, as stated in a dissent that became the opinion of the Oregon Supreme Court, a cross permitted to be erected on public property, though not adjoining a public building, was seen to have "placed the city officially and visibly on record in support of those who sought government sponsorship for their religious display." *Lowe* v. *City of Eugene*, 451 P.2d 117, 124 (Or.) (Goodwin, J., dissenting), *vacated on rehearing*, 459 P.2d 222, *aff'd on further rehearing*, 463 P.2d 360 (1969), *cert. denied*, 397 U.S. 1042 (1970).[12] *See also Gilfillan* v. *City of Philadelphia*, 637 F.2d 924, 931 (3d Cir. 1980), *cert. denied*, 451 U.S. 987 (1981);

---

judge observed that the crèche there involved was surrounded by such things as a reindeer and Santa's Workshop and that it was "hardly distinguishable" from the other objects at night. *Citizens, Etc.* v. *City & County of Denver*, 508 F. Supp. 823, 827–28 (D. Colo. 1981). Disagreeing with the then extant decision of the district court in *Donnelly* v. *Lynch*, 525 F. Supp. 1150 (D.R.I. 1981), and substantially anticipating this Court's contrary result therein (*cf.* Point II, *infra*), he rejected Establishment Clause attacks on the display. *Citizens, Etc.* v. *City & County of Denver*, 526 F. Supp. 1310 *(D. Colo. 1981), aff'd*, No. 82-1022 (10th Cir. May 14, 1984).

11 The cross in *Rabun County* was permanent, as was the cross in the case cited next. Again, the point of the association between the prevailing religion and the public authority is not essentially altered.

12 The quoted opinion of Judge Goodwin (now of the Ninth Circuit) had an odd sequel as well as a somewhat tortured history. Some years later, the sponsorship having changed to the American Legion, the Oregon Court (4–3) allowed the maintenance of the cross on city property. *Eugene Sand & Gravel, Inc.* v. *City of Eugene*, 558 P.2d 338 (1976), *cert. denied*, 434 U.S. 876 (1977).

Greater Houston Chapter of ACLU v. *Eckels*, 589 F. Supp. 222, 234-35 (S.D. Tex. 1984); *Goldstein* v. *Fire Department of Suffern*, 559 F. Supp. 1389, 1391 (S.D.N.Y. 1983); *Fox* v. *City of Los Angeles*, 587 P.2d 663 (Cal. 1978).

Universal human experience repeats the lesson recalled by this Court in *Spence* v. *Washington*, 418 U.S. 405, 410 (1974): "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." As scholars and all of us have observed, "people's responses to a symbol will be contingent upon their assessments of the circumstances of its usage."[13] So, for better or for worse, the same writers say: "When a particular symbol is used in conjunction with several other symbols, they may all become linked in the eyes of the general public."[14]

The impact of symbols and the associations between them are familiar matters though their full effects undoubtedly both transcend and precede consciously literal thought. The idea was captured in a landmark opinion of this Court, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943):

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes, the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person

---

13 C. ELDER & R. COBB, THE POLITICAL USES OF SYMBOLS 57 (1983).

14 *Id.* at 77.

> gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

In somewhat more social scientific prose, it has been said that

> while words tend to represent consciously articulated mental states, the evocative power of non-verbal symbols stretches beyond consciousness into the unconscious . . . . A non-verbal symbol, such as the *cross*, is both a carrier of old, sometimes universal meanings no longer expressed or expressible by language, and a source of new meanings.[15]

In a word, District Judge Stewart identified a compendious reality when he characterized the effect of the relationship between the crèche and the special turf of Boniface Circle as making that land the public "message bearer." The subject is a powerful symbol and a dramatic linkage, all in a web of relationships where conscious and unconscious feelings make it impossible to ignore that the site endows the crèche with a special public "aura"—"ecumenical" in respondents' telling characterization—that would not attend the free "speech" of living speakers.

This is near the heart of the matter, entirely overlooked by the Court of Appeals. In terms of cognate rights under the First Amendment, both to engage in expression and to avoid forced expression, is it tolerable to imagine *forcing* a village (leaving aside what a village might do voluntarily) to fly in its park an American flag adorned—some would say "defaced"—with a peace symbol, a swastika, or a hammer and sickle? *Cf. Spence* v. *Washington*, 418 U.S. 405 (1974). Or to make a place in the park for a "sexually explicit 'adult' " (but not obscene) statue? *Cf. Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 52 (1976). Or a sign denouncing a government policy with a four letter expletive? *Cf. Cohen* v. *California*, 403 U.S. 15

---

15 Z. BARBU, SOCIETY, CULTURE AND PERSONALITY 96 (1971) (emphasis in original). *See also* Sapir, *Symbolism*, in 14 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 492, 494 (1939).

(1971). Or a lawyer's advertisement? *Cf. Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977). A few days ago, on Veterans Day 1984, capping a series of emotional episodes, the President accepted for permanent placement on the Washington Mall a Vietnam Veterans Memorial.[16] Can it be argued seriously that the National Park Service must accept some other sign or symbol—whether permanently or for a week or two around each Veterans Day or Memorial Day—denouncing the Vietnam war, perhaps in the language of *Cohen* v. *California*, and declaring that the young men lost there gave their lives in vain?

The decisive point throughout is the patent difference between compelled placement on the public land of signs or symbols and the freely allowed presence of live speakers proclaiming their views or even advertising their wares. Once that difference is recalled, we move toward a sound end of the inquiry whether the residents of a village, through their elected representatives, are required over their objection to place in their parks statues or other symbols they find objectionable, divisive, ugly or otherwise unacceptable even though they express "protected" ideas. What the plaintiffs overlook in seeking to force their crèche onto Boniface Circle is the right of others not to join in their religious expression. The towns and villages of America would become nasty battlegrounds or ugly "immense bulletin board[s] whereon symbols of all [kinds] could be . . . displayed," *Fox* v. *City of Los Angeles*, 587 P.2d at 665, if the First Amendment were to be made the vehicle for such invasions. The freedom of the people to express their communal feelings in communally chosen symbols would be hobbled or sacrificed in a denial of all symbolic expression.[17] No such sullen choice is warranted, let alone

---

16 *See* N.Y. Times, Nov. 12, 1984, at A1; *id.*, Nov. 11, 1984, at A28.

17 It is assumed that villages like Scarsdale could avoid the compulsion to display unwanted symbols by banning all symbols of every kind—Community Chest, Red Cross, etc.—from their parks. *Cf. Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 508 (1981); *id.* at 528 (Brennan, J., concurring); *id.* at 550-52(Stevens, J., dissenting in part); *id.*

commanded, by the First Amendment.

Returning more narrowly to the main precedent respondents invoke, the decisive difference between this case and *Widmar* v. *Vincent* is that the installation of the crèche on Boniface Circle gives to that religious message the kind of "imprimatur of State approval on religious sects or practices" which was not conferred there by the granting of a right to speakers to use University meeting facilities. 454 U.S. at 274. Particularly "[i]n light of the large number of groups meeting on campus," the Court doubted that "students could draw any reasonable inference of University support from the mere fact of a campus meeting place." *Id.* at 274 n.14; *see also id.* at 280 (Stevens, J., concurring). Here, in contrast, the crèche is the only sectarian (Pet. App. 58a),[18] or even controversial, symbol that appears ever to have stood, or been advanced for placement, on Boniface Circle.

The Missouri University meeting place was a "forum generally open" (454 U.S. at 267) for student speakers; Scarsdale's parks have never supplied a "forum generally open" for statues or symbols or other unattended displays of partisan or sectarian positions. The only exception, increasingly controversial, was the crèche in the years 1957–1980. That exception has been eliminated. Respondents seek to restore it by judicial compulsion.

Further distinguishing *Widmar*, that case dealt with the particular kind of "public forum" found on a university campus, where off-campus meeting places are noticeably removed from the physical community inhabited by potential participants and auditors. In Scarsdale, on the other hand,

at 570 (Rehnquist, J., dissenting); *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2130, 2135 (1984). Our argument is that allowing such symbols as those Scarsdale has permitted without objection "does not transform government property" into a setting available for signs and symbols of any and every kind, no matter how objectionable to many or even most residents. *Cf. Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

18 "[I]t appears that only one religious symbol has been offered for display in Scarsdale's parks for as far back as anyone can recall" (Pet. App. 58a).

crèches are freely displayed (without objection) outside private homes and churches (Pet. App. 38a–39a), and the several available sites for respondents' crèches include private sidewalk space across the street from Boniface Circle (*id.* at 37a).

In short, once we supply the appellate court's omission of the distinctions between a symbol and speakers, respondents' mechanical reliance upon *Widmar* v. *Vincent* is seen to be a mistake. That case does not support their demand that Scarsdale be forced to emplace on its park an unwanted, unattended religious symbol. In the remainder of this Point, we undertake to demonstrate that sound First Amendment law neither requires nor permits such a judicial command.

C. Municipal Authorities May Provide "Public Forums" that Are "Generally Open" for "Speakers," "Discourse" and "Debate" without Being Required to Allow Placement therein of Partisan or Sectarian Signs or Symbols

It is a shared premise in this case, not disputed if not perfectly realistic, that the parks of Scarsdale and other suburban or rural American villages are "public forums," used like the prototypical Hyde Park or like the city streets and parks addressed in the classic doctrine of *Hague* v. *CIO*, 307 U.S. 496 (1939). Thus, it is accepted that the principles of *Hague* are applicable and that Boniface Circle may be deemed a "public forum" within the compass of those principles. This means it is important to consider what a "public forum" is, and what it is not.[19]

Beginning with the fountainhead pronouncements in *Hague*, the vital conception of the "public forum" envisions shared

19 Though the "public forum" label may fairly be attached to all parks and streets, it has never been thought that identical rules of access must apply to all public forums. Even among streets and parks, "[t]he nature of a place, 'the pattern of its normal activities' " dictates the manner in which its use may be regulated. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *see Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981); *Niemotko* v. *Maryland*, 340 U.S. 268, 282-83 (1951) (Frankfurter, J., concurring). It is at least relevant, if not controlling, that Scarsdale's parks have never housed controversial symbols and that Boniface Circle—the site plaintiffs specifically demand—has been used only rarely for *any* symbols, and then only for a few hours.

common ground open to live people for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." 307 U.S. at 515. The valued constitutional axiom is that people and groups can come together in the shared space to speak their minds, hear and be heard, agree or disagree, and learn freely from these encounters, with the State serving as neutral caretaker of the forum. The idea extends normally and naturally to people distributing leaflets, *Schneider* v. *State*, 308 U.S. 147 (1939), using amplification (within limits) of their voices, *Saia* v. *New York*, 334 U.S. 558, 562 (1948), and having with them symbols and accouterments that illustrate or underscore their declarations or preachments, *O'Hair* v. *Andrus*, 613 F. 2d 931 (D.C. Cir. 1979). It does not extend, however, to people leaving their leaflets behind them on the public land or placing their unattended symbols there. *See Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. 3065, 3070 (1984) ("we seriously doubt that the First Amendment requires the Park Service to permit a demonstration . . . involving a 24-hour vigil and the erection of tents"); *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2131.

The essence of the prized right has always involved living people, voicing views that are clearly and rightfully theirs.[20] *See United States* v. *Grace*, 461 U.S. 171, 184-85 (1983) (Marshall, J., concurring in part) ("Every citizen *lawfully present* in a public place has a right to engage in . . . expression") (emphasis added); *Schneider* v. *State*, 308 U.S. at 160 (discussing "the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature"). As this Court has lately

---

20 "[B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there." *Widmar* v. *Vincent*, 454 U.S. at 272 n.10.

reaffirmed, there is a difference markedly material for First Amendment purposes between speakers or distributors of leaflets whose "conduct continue[s] only while the speakers or distributors remain[ ] on the scene" and posted signs or symbols that are left on the public place and "remain unattended until removed." *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct., at 2131. The difference becomes vital enough to be decisive when, as here, there is no showing that the use of the public site "is a uniquely valuable or important mode of communication, or that [respondents'] ability to communicate effectively is threatened by . . . restrictions on expression." *Id.* at 2133.

In *Widmar* v. *Vincent*, the claimed foundation of respondents' case, the idea of *Hague* was carried forward in its familiar sense; the forum was generally "open to all forms of *discourse*" (454 U.S. at 273; emphasis added)—speech, talk, debate—"to religious and other *discussions*" (*id.* at 273 n.12; emphasis added). Not a word in *Widmar* suggests that a religious student group like the one there involved has a right to place in the University's meeting facilities a plaque containing the Ten Commandments, *cf. Stone* v. *Graham*, 449 U.S. 39 (1980), a Nativity scene, a Buddhist wheel, a menorah, a crucifix, or any other kind of sign or symbol. Notwithstanding other divergences, there appears to have been no disagreement with Justice White's observation in dissent "that the State need [not] stand by and allow its public forum to become a church for any religious sect that chooses to stand on its right of access to that forum." 454 U.S. at 287 n.5.

More broadly speaking, the idea of the "public forum" has never meant that there is a right under the First Amendment (or any other source) to demand public space for the placement of signs or symbols or other objects as forms of expression. *Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. at 3070; *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2131. Responsible public officials may provide space in the park for sculpture, temporary or permanent (as, currently, for works of Henry Moore in parks and other public sites around the country). But though all agree that artistic expres-

sion, ideological or not, is a First Amendment freedom, *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981); *Winters* v. *New York*, 333 U.S. 507, 510 (1948), it is not supposed that the citizen has a right to display his or her plastic efforts in the park to make aesthetic, religious, political or other statements. People may not "insist that the flags of their choice be flown alongside the American flags that ring the Washington Monument." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 590 (1978). Before the remarkable expansion of *Widmar* v. *Vincent* by the Court of Appeals in this case, there was no basis for thinking that incantation of the phrase "public forum" would compel municipal authorities to make places in the park either for unattended signs and symbols most people hate—*e.g.*, vulgar denunciations of the draft, like the words protected in *Cohen* v. *California*, swastikas, etc.—or for objects that most people may love or revere, but that are nevertheless objectionable or repugnant to others on sectarian or other partisan grounds.

In short, a basic error of the Court of Appeals, fatal in itself, lay in its application of *Widmar* under the misconception that in the "public forum" every form of expression is fungibly "speech" in a relevant constitutional sense.[21] The pointedly "narrow" basis of that decision, 454 U.S. at 277, fails to support respondents' claim that Scarsdale *must* display their crèche in Boniface Circle.

The case would be different, of course, if Scarsdale took sides and discriminated among sectarian or partisan adherents.

---

21 In lumping together all forms of expression as indistinguishable "speech," the Court of Appeals ignored this Court's several recent reminders that government can "tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 82 n.6 (Powell, J., concurring). The rules governing different forms of communication must "reflect the 'differing natures, values, abuses and dangers' " of each. *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. at 501; *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975). The law may respond to the "peculiar problems" of the medium, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503 (1952), even if this entails prohibiting in one setting expression that would receive constitutional protection in most others. *FCC* v. *Pacifica Found.*, 438 U.S. 726, 746-47, 750 n.28 (1978).

Fowler v. *Rhode Island*, 345 U.S. 67, 69 (1953); *Niemotko* v. *Maryland*, 340 U.S. at 272. But there is no question of this nature in the case. The plaintiffs support the demand for display of their crèches in Boniface Circle on the ground that other plots of Scarsdale's public land have been used to house briefly things like the Community Fund rocketship, a Girl Scout model campsite, the Red Cross symbol, the Cancer Committee sword and United Fund signs. These signs of basic American verities are displayed with no faint hint of any objection, opposition or upset on the part of anyone over any of them. If controversies of that sort should ever arise—very possibly triggered by pressures like the ones in this case to win the public places as ideological or religious possessions—hard questions will have to be faced. As things stand, however, nobody has reason to anticipate that the hammer and sickle need be added to the ring of flags around the Washington Monument any more than the largely black village in Mississippi must install a burning Klan cross on its green or Hasidim in upstate New York must feature a crucifix—all in the name of Free *Speech*.

D. Substantial Interests and Basic First Amendment Principles Sustain Scarsdale's Position

Three First Amendment interests must be harmonized in this case: (i) respondents' claimed right of free expression, for which they seek to place a crèche on Boniface Circle; (ii) the claimed right of their neighbors, also embraced by the Free Speech Clause, to refrain from appearing to support or join in religious ideas that they oppose when presented in this fashion; and (iii) the related interest of public officials in steering clear of Establishment Clause violations and preserving neutrality in both fact and appearance. Fairly weighed, the balance of these interests must be struck against the respondents. The overwhelming weight on petitioners' side is especially preponderant in light of the focused insistence of respondents that a crèche be displayed precisely at Boniface Circle or another public site when others (and theirs as well) are or can be freely displayed all over Scarsdale, both next to and away from the park.

The lines of principle and precedent supporting Scarsdale's position may be summarized under three other topic headings:

(1) The municipal government is entitled, and may be obliged, to refrain from causing its citizens to support, or appear to support, moral or religious or otherwise partisan ideas that substantial numbers of these people conscientiously oppose.

(2) The government is empowered, if not required, in managing its property and other affairs, to stand neutral among partisan or sectarian interests.

(3) The requirement of neutrality among religions includes a significant interest in avoiding even near approaches to collisions with the Establishment Clause.

We elaborate these thoughts in this subpoint.

1. *Avoiding compelled support.*—Appearing, as is respondents' desire, to be joined with the Village in its religious statement, the crèche located on Boniface Circle is opposed by Christians as well as nonChristians who see this as "mingling government and religion in objectionable fashion" (J.A. 44). If a court or other official overrides these and allied objections, compelling placement of the crèche in the park, these opponents are dragooned into supporting the symbol and its public statement. Compulsion of this kind amounts to a form of forced communal expression that is offensive under the First Amendment.

West Virginia State Board of Education v. *Barnette*, 319 U.S. at 642, is, again, a bright starting-point:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

That "fixed star," celebrating and protecting the autonomous human spirit, entails freedom from forced support of or identification with unacceptable ideas. Thus, the First Amendment protects employees from "compulsory subsidization of

ideological activity" by prohibiting unions from expressing political or ideological views over the objections of members or nonmembers compelled tc contribute to the union fisc. *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 235–36, 237 (1977). *See also Elrod* v. *Burns*, 427 U.S. 347, 355, 373 (1976). The owner of so impersonal an artifact as a license plate may not be forced to bear a message that is ideologically "unacceptable" or "morally objectionable." *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977). Though it may be acceptable to or even cherished by most people, support of a message is not to be forced upon even a small minority for whom it "is repugnant to their moral and religious beliefs." *Id.* at 707. More than one recent utterance by Justices of this Court, even if not carrying specific decisional days, has warned against employment of shared public resources to "subsidize" or publish (or appear to be supporting) partisan positions that are uncongenial or offensive. *See FCC* v. *League of Women Voters*, 104 S. Ct. at 3131–32 (Rehnquist, J., dissenting); *id.* at 3133, 3136 n.7 (Stevens, J., dissenting) (public broadcasting "listener's interest in not having his tax payments used to finance the advocacy of causes he opposes"); *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 551–52, 555 (1980) (Blackmun, J., dissenting) (utility's distribution of pamphlets in billing envelopes "amounts to a forced subsidy of the utility's speech by ratepayers" even though it "may cost the ratepayers nothing").

The concern for the religious or nonreligious objections of Scarsdale residents opposed to the public crèche display is more fundamental than the protection of "unwilling viewers against intrusive advertising," *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2129–30, that justified barring of political expression in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). It is not in principle an extension of *Wooley* v. *Maynard* to say that municipal officials must not appropriate the village common for the erection of signs or symbols that are shown genuinely to offend or outrage

those who share in the ownership of that ground.[22] Shared village properties—whether "greens" or "commons" or small circles in a suburban place like Scarsdale—are freighted with at least as much emotional attachment as the official metal stamp that is a license plate. The differences in the physical objects and relationships are not such that the form of forced expression barred in *Wooley* v. *Maynard* is allowable in a park held for all the people.

Given the First Amendment protection against forced support or affirmation of repugnant ideas, there ought to be no doubt that a substantial black population of an American village should not be compelled to contemplate a burning cross standing unattended on the village green; that patriotic villagers are not required to display for days or weeks in the park a flag that has been in their perception defaced by markings permissible for display on private property, *see Spence* v. *Washington*, 418 U.S. 405 (1974); that municipal officials whose constituents include a Jewish admixture should not be ordered by a court to emplace on the public circle a sign saying "God does not hear the prayers of Jews." But all these afflictions follow from the Free Speech Clause as invoked by respondents and interpreted by the Court of Appeals in this case. Symbolic expressions that the majority detests are, if anything, more urgent concerns of that Clause than expressions the majority finds agreeable. *United States* v. *Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). Respondents have handled the foregoing implications at every stage of this case by simply ignoring them. The Court of Appeals did likewise. The unanswered question does not vanish or become less telling for being ignored.

Boniface Circle, like all parks, is a "unique resource[] that

22 The relevant thought of "offense" or even outrage is not confined to matters—swastikas, burning crosses, etc.—instantly characterized that way by almost everyone. There is a small but not inconsequential minority for whom such sacred things as the Bible are offensive. *See Abington School Dist.* v. *Schempp*, 374 U.S. 203, 283 (1963) (Brennan, J., concurring). There is a more substantial group for whom the interlacing of their own religion with the public authority is strongly objectionable as a cheapening of or intrusive threat against their faith. *See id.* at 259.

the . . . Government holds in trust for the . . . people," *Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. at 3067; it is "for all the people, and their rights are not to be trespassed even by those who have some 'statement' to make." *Id.* at 3072 (Burger, C. J., concurring). In this light, and under *Wooley* v. *Maynard*, it is solidly arguable that those opposing the crèche on Boniface Circle have a "First Amendment *right* to avoid becoming the courier" (430 U.S. at 717; emphasis added) in this fashion of a mode of expression repugnant to them. But there is no need in this case to reach that submission. It suffices to hold, as petitioners urge, that the Board was not compelled to grant permission to have the land bear the symbol and its sectarian message. Combined with the other substantial interests justifying this minor encroachment on respondents' rights, the avoidance of compelled support sustains the Village's decision.

2. *Avoiding favoritism or its appearance.*—Among the aspects of this case that are not adequately handled by pat labels is the concern of Scarsdale's Trustees to regulate the park properties evenhandedly. This is another case "falling between the paradigms of government property interests." *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2134 n.32. In terms of the cited passage, the property here involved is among "those clearly held in trust, either by tradition or recent convention, for the use of citizens at large." *Id.* This case falls outside that familiar paradigm, however, in presenting the demand for a *symbol* to be left in the park where the message is freely conveyed all over the Village but is opposed as a kind of public expression by others who are beneficiaries of the "trust." In these circumstances, the decision of the Trustees (who are trustees in the most literal legal sense) to refrain from forcing participation in respondents' religious expression is a sound fulfillment of their duty not to play favorites.[23]

23 In the traditional legal conception of their role, the Trustees are to seek maximally fair accommodation of their beneficiaries' competing interests. *See* 3 A. SCOTT, THE LAW OF TRUSTS § 232, at 1894-95 (1967); 2 A. SCOTT, THE LAW OF TRUSTS § 183, at 1471; RESTATEMENT (SECOND) OF TRUSTS § 183 (1959).

The government's interest in avoiding a partisan or sectarian stance or appearance is a weighty one. It has justified, though it does not require, restrictions on political speech, which "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey* v. *Brown*, 447 U.S. 455, 467 (1980). To remove "lurking doubts about favoritism," a municipality may discriminate against political advertisements, banning them from public busses while permitting other kinds of messages to be conveyed. *Lehman* v. *City of Shaker Heights*, 418 U.S. at 304. A military base open to visitors and invited speakers may be declared off limits to political speakers and pamphleteers to further "the constitutional tradition of a politically neutral military establishment." *Greer* v. *Spock*, 424 U.S. 828, 839 (1976); *id.* at 845 (Powell, J., concurring) (noting the "legitimate" public interest "in maintaining the reality and appearance of political neutrality").

Government's objective of maintaining the appearance of political neutrality—which, unlike religious neutrality, is not an explicit constitutional command—is sufficient to justify denial of core First Amendment rights of political expression to the whole class of civil service workers. *See CSC* v. *Letter Carriers*, 413 U.S. 548, 564 (1973); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 94–95, 102 (1947); *see also Elrod* v. *Burns*, 427 U.S. at 371 (in *CSC* and *Mitchell*, the Court held that "[s]ubordination of some First Amendment activity was permissible to protect other such activity"). So, too, limits on political contributions, which tread "in an area of the most fundamental First Amendment activities," can be justified by the government's interest in avoiding "the appearance of corruption." *Buckley* v. *Valeo*, 424 U.S. 1, 14, 27 (1976).

The concern with "appearance" pervades this subject and is a factor of consequence in the present case. *Cf. Roemer* v. *Board of Public Works*, 426 U.S. 736, 747–48 (1976); *Stone* v. *Graham*, 449 U.S. at 42; *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 125–26 (1982); *Lynch* v. *Donnelly*, 104 S. Ct. at 1368–69 (O'Connor, J., concurring); *Buckley* v. *Valeo*, 424 U.S. at 236 (Burger, C.J., concurring in part and dissenting in part); *id.* at 262, 265 (White, J., concurring in part and

dissenting in part); *FCC* v. *League of Women Voters*, 104 S. Ct. at 3132 (Rehnquist, J., dissenting). The appearance of public sponsorship or approval of the message of the crèche standing on the public place was correctly identified by the District Court as a matter of capital importance.

The concern to avoid sectarian favoritism, or the appearance of it, takes on particular significance when it is appraised against the essentially needless insistence of respondents on duplicating their symbol at Boniface Circle. Nativity scenes are displayed, and can be displayed without a murmur from anyone, on nonpublic land all over Scarsdale. Where there is such an abundance of outlets and such certainty that the message will be conveyed, the *free speech* claim on which respondents count dwindles markedly in the comparison. *See Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2132–33; *Regan* v. *Time, Inc.*, 104 S. Ct. 3262, 3294–95 (1984) (Stevens, J., concurring) (noting that there, too, the claimed "communicative interest" was a "weak" one); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 62, 71.

Apart from its special relationship to the commonly owned public land, a municipality may restrict "protected" expression even in private areas to further its "interest in preserving the character of its neighborhoods." *Young* v. *American Mini Theatres, Inc.*, 427 U.S. at 62, 71. The comparison with *Mini Theatres* is limited, to be sure, on both sides of the scale—involving, for most people, a far less favored form of expression on one side, but also a less momentous municipal concern on the other. Acknowledging the gap, we may fairly invoke a major thought from Justice Powell's concurrence, adapted to the different facts here: "[Scarsdale] has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [Nativity scenes]. The [restriction] is addressed only to the places at which this type of expression may be presented, a restriction that does not interfere with content." *Id.* at 78–79.

3. *Neutrality and the Establishment Clause.*—Assuming here, as throughout this Point, that the Establishment Clause does not *compel* Scarsdale to deny respondents' applications

(*cf.* Point II, *infra*), the Trustees' judgment nevertheless derives support from that Clause. The Court has marked as "perhaps the central purpose of the Establishment Clause . . . the purpose of ensuring governmental neutrality in matters of religion." *Gillette* v. *United States*, 401 U.S. 437, 449 (1971). Not less than courts, executive and legislative officials are bound to observe "that when government activities touch on the religious sphere, they must be secular in purpose, even-handed in operation, and neutral in primary impact." *Id.* at 450. In this close case, even if the Court should hold that it was not required by the "letter" of the Establishment Clause, Scarsdale's action was surely close to the "spirit," as the Trustees concluded (Pet. App. 31a).

The fact that Establishment Clause concerns are at least legitimate and substantial in this case adds support to the judgment of Scarsdale's Board. To paraphrase this Court's cognate observations on Free Exercise Clause concerns, "[q]uite apart from the question whether" the Establishment Clause required this judgment, "it is hardly impermissible" for the Board "to attempt to accommodate" the "values" for which that Clause exists. 401 U.S. at 453; *see also Walz* v. *Tax Commission*, 397 U.S. 664, 673 (1970). In connection with the Religion Clauses, as with other prized constitutional rights, it is fitting and proper for officials to assign weight to the constitutional interests at stake even when the resulting deference would not be compelled by a judicial decree. That proposition applies to the interests safeguarded by the Establishment Clause. *See Norwood* v. *Harrison*, 413 U.S. 455, 462, 469 (1973).

The "room for play in the joints" as between the Religion Clauses themselves, *Walz* v. *Tax Commission*, 397 U.S. at 669, extends to the accommodations required here, where both the Establishment Clause and competing Free Speech Clause claims are in issue. Especially in light of respondents' weak demand to replicate the crèche and its message on public land, this is a case where a decent latitude must exist for sober choice within the "neutral area." *Tilton* v. *Richardson*, 403

U.S. 672, 677 (1971).[24] In all the circumstances, if Scarsdale's Board could allow the crèche, it should not follow that it is compelled to. The interests under the Establishment Clause of those who profess minority religions or none at all are not less worthy than the Free Exercise interests that have been held in other cases to have weight without being controlling.[25] Scarsdale's Board did and could "rationally conclude . . . that constitutional neutrality . . . might best be achieved by withholding" the public site respondents demand. *Norwood* v. *Harrison*, 413 U.S. at 462, 469. This factor, revisited briefly later in the context of our Establishment Clause argument (pp. 47-48, *infra*), adds to the significant interests that vindicate Scarsdale's position.

E. Scarsdale's refusal to Display a Crèche is Sustained by Compelling Interests

For reasons canvassed in the preceding pages, however "rigorous" may be the "standard of review" applicable to this case, "the weighty interests" of Scarsdale under the First Amendment "are sufficient to justify the limited effect upon First Amendment freedoms caused by" denying a public site for crèches that may be displayed everywhere else in the Village. *Buckley* v. *Valeo*, 424 U.S. at 29. Even if the test be framed in terms of a "compelling state interest," that standard is satisfied. The Trustees confronted competing claims: on one side, respondents' weak interest in a public site, in addition to all manner of private sites, for a crèche; on the other side, the

---

24 Other instances illustrate the space for judgmental distinctions between what the First Amendment compels and what it permits. As held in *Walz* v. *Tax Comm'n*, tax exemptions may be given to religious groups, but they do not appear to be compulsory. *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983); *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983). That transportation and textbooks may be supplied to parochial school children, *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947); *Board of Educ.* v. *Allen*, 392 U.S. 236 (1968), does not entail that they must be. *Norwood* v. *Harrison*, 413 U.S. at 462, 469; *Luetkemeyer* v. *Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974).

25 One group of respondents, it may be recalled, started with an unmeritorious Free Exercise claim that was abandoned after its rejection by the District Court. *Supra*, p. 8 & n.3.

First Amendment protection against forced sectarian expression, the duty fairly to administer public property and the close approach (at least) to an Establishment Clause violation. Combined, if not singly, these latter interests are fairly characterized as "compelling." Scarsdale's Trustees could certainly deem "paramount" the interests opposed to respondents'—could, as they did, find this a situation where "[s]ubordination of some First Amendment activity was permissible to protect other such activity." *Elrod* v. *Burns*, 427 U.S. at 362, 370–71.

There is no mathematical test, obviously, for assigning weights to various interests in this setting.[26] The answer in every case must be found in the Court's informed judgment. Recalling a variety of instances where interests have qualified as "compelling"—and thus sufficient to justify suitably drawn restrictions on speech—petitioners submit that the present case merits that characterization. *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976), treating as "compelling" the interest in uncorrupted elections; *see Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. at 540; *FCC* v. *League of Women Voters*, 104 S. Ct. at 3124-26; *Regan* v. *Time, Inc.*, 104 S. Ct. at 3271; *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 94 (1977); *Carey* v. *Brown*, 447 U.S. at 471. *Cf. CSC* v. *Letter Carriers*, 413 U.S. 548 (1973).

II. *LYNCH* V. *DONNELLY*, ALLOWING MUNICIPAL OFFICIALS TO INCLUDE A CRECHE IN A DISPLAY, IS DISTINGUISHABLE AND DOES NOT SUPPORT A JUDICIAL ORDER COMPELLING SCARSDALE'S BOARD TO PERMIT A CRECHE IN BONIFACE CIRCLE

The Court of Appeals reasoned that:

(i) *Widmar* held that the University's Establishment Clause claim did not make out a sufficiently "compelling interest" to warrant denial of its open forum to religious speakers (Pet. App. 14a).

26 "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong." *United States* v. *O'Brien*, 391 U.S. 367, 376–77 (1968).

(ii) If Scarsdale chose to permit a crèche in Boniface Circle, it "would not contravene" the Establishment Clause under *Widmar* and *Lynch* v. *Donnelly* (Pet. App. 24a).

(iii) Therefore, since Pawtucket's officials were *allowed* in *Lynch* to display a crèche, Scarsdale's Trustees are *compelled* under *Widmar* to permit one in Boniface Circle.

Both the second and third steps in this reasoning are fallacious. Both, as argued in Point I, involve an erroneous equating of this case with *Widmar*. Proceeding further, both ignore that this case is distinguishable from *Lynch* in respects that make a decisive difference under the Establishment Clause.

Given the recency of *Lynch*, it would be inappropriate, and it seems unnecessary in any event, to reargue the elements of "the line-drawing process" leading to that decision. 104 S. Ct. at 1362 Instead, we simply outline the differences that are urged to place the present situation on the other side of the line. Then we show that *Lynch* is distorted if it is read to mean not only that some municipalities that desire crèches *may* have them but that municipalities that do not desire crèches *must*.

A. There are Material Distinctions between the Pawtucket and the Scarsdale Facts

1. The Pawtucket crèche stood on private land, 104 S. Ct. at 1358, unlike the markedly public Boniface Circle featuring the Village war memorial and an American flag.[27] The symbolic significance of the public place, pointedly desired by respondents for their crèches and vivid to everyone in the Village, has been discussed earlier. It is noteworthy in addition that respondents have been urged repeatedly and in vain—by the Advisory Council and the Trustees, among others—to accept a prominent private site for their display (J.A. 134,

27 The four dissenters in *Lynch*, focusing on its "narrow result," perceived sufficient differences in this regard to note that the decision "leaves open questions concerning the constitutionality of the public display on public property of a crèche standing alone." 104 S. Ct. at 1370 & n.1.

135, 136, 145, 146, 151–52, 157–58, 201, 204, 206, 222; J. Ex. 157-58, 162; Stip. Ex. 63 at p. 91; Stip. Ex. 66 at pp. 9, 13). There would be no objection and no controversy whatever if respondents accepted that alternative. Respondents' steadfast rejection of that option identifies precisely why they have insisted on the public platform—as a show of their right and power to "join" with them in their religious expression the entire Village, those who reject as well as those who revere the message of the Nativity scene.

In a Village where other crèches, without protest or limitation, appear on nonpublic church and residential sites to affirm the "real significance of Christmas time" (*see* Pet. App. 38a–39a; J.A. 70) nothing other than the public mantle makes the public site "uniquely valuable or important" for respondents' religious proclamation. *Members of the City Council* v. *Taxpayers for Vincent*, 104 S. Ct. at 2133. This significant point of Judge Stewart's opinion, not mentioned by the court below—that "the land actually becomes the message bearer" (Pet. App. 55a)—was absent from *Lynch*.

2. The Scarsdale crèche has always been presented and displayed standing by itself in Boniface Circle, starkly and singly making its religious statement where the only other structure is a war memorial and the American flag flies at the opposite end of this small oval. *Lynch* v. *Donnelly* involved an annual "display" that

> comprise[d] many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Clause house, reindeer pulling Santa's sleigh, candystriped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue [there]. [104 S. Ct. at 1358.]

The opinion of this Court over and over again referred to this "display" and defined the question presented as concerned with the practice of "including a crèche . . . in [an] annual Christmas display" (*id.*). Four dissenting Justices, citing the instant case in the District Court as a comparison, said that "given the Court's focus upon the otherwise secular setting of the Pawtucket crèche, it remains uncertain whether absent

such secular symbols as Santa Claus' house, a talking wishing well, and cut-out clowns and bears, a similar nativity scene would pass muster under the Court's standard" (*id.* at 1370 n.1). The concurring opinion concluded that the "display of the crèche in this particular physical setting" was not an endorsement of religion (*id.* at 1369).[28]

It is not useful to labor at length what that aspect of the Court's opinion meant or will come to mean in light of differing circumstances. Suffice it to note, first, that the swift dismissal of this "display-context argument" in one paragraph by the Court of Appeals (Pet. App. 22a–23a) is not readily reconcilable with the fact that this Court focused on the "display" by repeating that very word not less than 11 times in its factual discussion (104 S. Ct. at 1358) and several times thereafter, proceeding to its conclusion that "the presence of the crèche in this display" does not violate the Establishment Clause (*id.* at 1365). Unquestionably, as the Court of Appeals said, this Court also set the question in the broader context of the "Christmas Holiday season" and widespread seasonal decorations (*id.* at 1362). Many subjects call in this fashion for successively widening perspectives. But it is difficult to say that in a decision geared to the drawing of lines around the carefully identified particular circumstances (*id.* at 1361–62),

---

28 The District Court found that plaintiffs' crèche was not displayed "as part of an event having an overriding secular effect" (Pet. App. 60a n.14). The Court of Appeals held the display issue irrelevant, finding *Lynch* not "based upon the physical context within which the . . . creche was situated" (*id.* at 23a). Guided by its focus on the broader context of the season, the Court found (*id.*) that the Christmas lights and ornaments installed throughout Scarsdale's streets (including Boniface Circle) and the one day carol sing permitted at various public sites through the years (including Boniface Circle, where, however, caroling has not coexisted with the crèche display since 1971) rendered "the Christmas celebration in the Village . . . not significantly different than the Christmas celebration described in *Lynch*." Narrowing the focus, it is clear—and uncontested—that viewers of plaintiffs' crèche see no other symbols on Boniface Circle to "negate[ ] any message of [government] endorsement." *Lynch* v. *Donnelly*, 104 S. Ct. at 1369 (O'Connor, J., concurring). From yet another angle, this case poses no question of whether the crèche would "'taint' the City's exhibit" (*id.* at 1365); here, the crèche has been and would again be the entire exhibit.

the frequently reiterated mention of the "display"—and the "inclusion" of a crèche therein—may be discounted as if the Court had not written it.

Certainly, as a matter of arresting impact, the crèche standing alone on the public oval is a more powerful symbol than a crèche in a display where it may come perhaps to be "hardly distinguishable" from the other, emotionally neutral objects around it. *See Citizens, Etc.* v. *City & County of Denver*, 508 F. Supp. at 827–28. The one federal court to consider the subject after the decision below, finding public display of such a symbol violative of the Establishment Clause, stressed that the Nativity scene before it stood on public property by itself; it concluded that this Court's *Lynch* decision "does not, either on its face or in any implicit proclamation, hold that a nativity scene standing alone . . . complies with the requirements of the separation of church and state required by our Constitution." *ACLU* v. *City of Birmingham*, 588 F. Supp. 1337, 1339 (E.D. Mich. 1984).

3. Divisiveness—actual and severe, not merely potential—has been notable in Scarsdale over the years of the crèche controversy. As a lead plaintiff has acknowledged (J.A. 248-49, 260), the issue has been a fierce one in Scarsdale for years; votes have been sought and cast on this basis (J.A. 65–66, 293; J. Ex. 191–92); threats and interdenominational rancor have attended the demand that the crèche convey its message on public land in addition to the ample private sites where crèches stand (Pet. App. 30a-39a; J.A. 38–41, 44–45, 65–66; J. Ex. 157–206). In contrast, there was "no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket's Christmas celebration." *Lynch* v. *Donnelly*, 104 S. Ct. at 1365. The record here, unlike that in *Lynch*, is replete with "evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." 104 S. Ct. at 1367 (O'Connor, J., concurring).

While divisiveness alone may not determine the question, it is "admittedly an evil addressed by the Establishment Clause." *Id.* The fear that neighbors would be pitted against each other

by jockeying for religious leverage in government, just as bloody wars had been fought so often over religion, played a palpable role in the adoption of this safeguard. *See Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 795–96 (1973); *Lemon* v. *Kurtzman*, 403 U.S. 602, 622–23 (1971); *Everson* v. *Board of Education*, 330 U.S. at 8–9; *Walz* v. *Tax Commission*, 397 U.S. at 694, 695 (Harlan, J., concurring). The absence of divisiveness was noted as "significant" in the concurring opinion in *Lynch*. 104 S. Ct. at 1369. Its presence is significant here.

In Scarsdale, both sides see the dispute in terms classically addressed by the Establishment Clause. The respondents demand uncompromisingly that the Village "join" in their expression. Opponents of the public site resist exactly that joinder. In the circumstances, the former habit of permitting the crèche on Boniface Circle was properly discontinued because it had become a "practice . . . [having] the effect of communicating a message of government endorsement . . . of religion"—thus making "religion relevant, in reality [and] public perception, to status in the political community." *Lynch* v. *Donnelly*, 104 S. Ct. at 1368–69 (O'Connor, J., concurring). *Cf. Larkin* v. *Grendel's Den, Inc.*, 459 U.S. at 126-27; *Lemon* v. *Kurtzman*, 403 U.S. at 622-23. The Scarsdale Trustees were on solid ground when they voted to deny the crèche applications because they "were concerned with violating either the letter or spirit of the constitutional prescription that there be a separation of church and state" (Pet. App. 31a).[29]

---

29 The concept of "political division along religious lines," *Lemon* v. *Kurtzman*, 403 U.S. at 622, may not be unambiguous. It may refer to contending positions, arising in whole or in part from religious convictions, concerning such diverse subjects as abortion, welfare legislation, gambling and conscription, among many others. This kind of division is to be expected, welcomed and protected. *See id.* at 623; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 866–67 (1978); Gaffney, *Political Divisiveness along Religious Lines*, 24 ST. LOUIS U.L.J. 205 (1980). In another, quite different sense religions may compete *qua* religions for special "access to government or governmental powers." *Lynch* v. *Donnelly*, 104 S. Ct. at 1366 (O'Connor, J., concurring). Or in a related but more grave form of entanglement, adherents may seek "government endorsement or dis-

4. Pawtucket's officials argued successfully that they had "legitimate secular purposes" for including the crèche in their display. 104 S. Ct. at 1363. It was their judgment that this endeavor was a proper means of celebrating the national holiday and promoting Christmas business. *Id.*; *id.* at 1372 (Brennan, J., dissenting). No similar purpose is asserted or acknowledged here. On the contrary, Scarsdale's governing body has refused to have the crèche, finding that it serves no permissible secular purpose. In such circumstances, only respondents' religious purposes would be furthered by their use of the public land, in contravention of the Establishment Clause. *ACLU* v. *Rabun County Chamber of Commerce*, 510 F. Supp. at 891, 678 F.2d at 1391 (holding unconstitutional the placement of a cross in a public park because it was "erected 'out of [the] religious stirrings' " of private sponsors); *Allen* v. *Morton*, 495 F.2d 65, 85 (D.C. Cir. 1973) (Leventhal, J., concurring); *Goldstein* v. *Fire Department of Suffern*, 559 F. Supp. at 1391; *Lowe* v. *City of Eugene*, 463 P.2d at 362. *Cf. Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Evans* v. *Newton*, 382 U.S. 296, 301–02 (1966).

It is not an answer to say that the rule of *Widmar* v. *Vincent* establishes a secular purpose for having the crèche in Boniface Circle. If anything is clear in this record, it is that Scarsdale has never created a "forum generally open," on Boniface Circle or anywhere else, for the posting of sectarian or otherwise divisive statuary or symbols. Whether the exception for the crèche was right or wrong while it existed, it gives no First Amendment "secular" license for continuing this public display against the judgment of those responsible for running the parks on behalf of people of all religions or no religion at all.

It must be acknowledged in comparing this case with *Lynch* v. *Donnelly* that the differences do not necessarily run all one

---

approval of religion" which "sends a message to nonadherents that they are outsiders, not full members of the political community." *Id.*; L. TRIBE, *supra*, at 868–69. The latter kinds of competition are those that ancient and contemporary history reveals as potentially dangerous. It is both the fact and appearance of such divisions that are concerns in this case.

way. The Court of Appeals thought the decision should be *a fortiori* for respondents herein because "the city involved in *Lynch* purchased, erected, displayed, sponsored and owned the creche therein" (Pet. App. 19a). That counts some against our position, though it must be added at once that it is a heady form of "state action" indeed for a federal court to compel a municipality to permit a religious symbol in its park. *Cf. Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. at 556 (Burger, C.J., dissenting).[30] The balance in the end calls for sensitive judgment on the particular facts, not the kind of relatively mechanical reasoning of the court below. It is our respectful submission that the distinctions stressed above—the public site, the dramatic isolation of the crèche, the divisiveness and the absence of any semblance of a secular purpose—differentiate this case materially from *Lynch*.

B. Even if Scarsdale Would not Violate the Establishment Clause by Allowing a Crèche, It Is not Required to Do So

In considering the University of Missouri's position in *Widmar* this Court followed the three-prong analysis in *Lemon* v. *Kurtzman*, found none of the "tests" flunked, and rejected the University's "compelling state interest" claim under the Establishment Clause. The Court of Appeals in this case undertook to duplicate that course. We have urged at length that the supposedly logical pattern does not fit because the *Widmar* premise of a "forum" for *speakers* is inapplicable. Here, briefly supplementing that argument, we reemphasize that a further distinction from *Widmar* has emerged. The Establishment Clause concern in that case, approved by no Member of the Court, was seen readily to be unfounded. In

---

30 It might also be suggested that the *unseen*, nominal financial sponsorship by Pawtucket (104 S. Ct. at 1358) is a less apparent form of support than the conspicuous joinder of public land and religious symbol sought by plaintiffs. *Cf. Stone* v. *Graham*, 449 U.S. at 42; *ACLU* v. *Rabun County Chamber of Commerce*, 678 F.2d at 1389 n.19, 1390 n.22.

Lynch, the question was much closer. Even assuming the circumstances here are held to be governed by *Lynch* for Establishment Clause purposes, it seems obvious that the line between violation of and compliance with that Clause is on these facts of no more than a hair's breadth.

Whichever side of the line this case is on, the argument for Scarsdale's position under the Establishment Clause is significantly more powerful than the corresponding argument in *Widmar*. It is an argument of sufficient weight, all things considered, to make out the "compelling interest" that should bar a judicial decree commanding that a crèche be placed in Boniface Circle contrary to the judgment of the people's representatives. There is at minimum a cogent Establishment Clause *interest* in addition to the related objections of major constitutional import. *See* pp. 37-39, *supra*. The Trustees' position that permitting the crèche would violate the "letter or spirit" of the Establishment Clause is a responsible and weighty one, reached in unquestioned good faith.[31] In sum, both of our major Points support Scarsdale's position that it has validly respected the several First Amendment claims of all its residents in denying respondents' applications. If for no broader reason, the Board's decision should be sustained as a reasonable accommodation of all the relevant community interests at stake.

---

31 *See* the acknowledgments by Trustees on both sides of the reasoned and mutually respectful process (J.A. 156, 167–8, 169).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

MARVIN E. FRANKEL
(*Counsel of Record*)

STEVEN E. GREENBAUM
MARC D. STERN

KRAMER, LEVIN, NESSEN, KAMIN & FRANKEL
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Petitioners
The Board of Trustees of the Village of Scardale and the Village of Scarsdale

November 29, 1984